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No. 87-2078

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GORDON PANTER, JIM MALLORY, LEO VINCENT, J. J. EDRINGTON, JOE TEDESCUCCI, R. L. FRENCH, JOHN W. VOGT, TILFORD WAGERS, JIM BURNS, KENNETH PEARL - - - - - Petitioners

versus

AMERICAN SYNTHETIC RUBBER CORPORATION, and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, Local 423 and
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, International Union AFL-CIO - - - Respondents

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

BRIEF OF AMERICAN SYNTHETIC RUBBER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all parent companies, subsidiaries and affiliates of American Synthetic Rubber Corporation.

The following companies have a minority ownership interest in American Synthetic Rubber Corporation:

1. American Hoechst Corporation
2. Chromalloy American Corporation
3. Converse Rubber Corporation/A Division of Electra
4. Dunlop Tire & Rubber Corporation
5. Goodall Rubber Company
6. Pickens Footwear
7. W. R. Grace & Company
8. Hewitt-Robbins/A Division of Litton Industrial Systems, Inc.
9. Lacrosse Rubber Mills Company
10. Michelin Corporation
11. Norbalt Rubber Corporation
12. Rubbermaid Incorporated
13. Dart Industries, Inc.
14. Simplex Wire & Cable Company

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Rule:

Rule 17.1, Supreme Court Rules 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF AMERICAN SYNTHETIC RUBBER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

In March 1981, Respondents American Synthetic Rubber Corporation (ASRC) and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 423 (Union) negotiated a three year collective

bargaining agreement. Under that agreement, employees who had more than two years of seniority retained recall rights no matter how long they remained laid off. The agreement also provided for severance pay upon lay off. However, under the agreement, an employee who received severance pay forfeited all his seniority and recall rights. (R. 51 and 65).[1]

Petitioners were employed by ASRC. They were represented for collective bargaining purposes by the Union. Petitioners, as well as a number of other employees, were laid off in 1981 as a result of ASRC's decision to close part of its manufacturing facility.

In March, 1984, the Union and ASRC negotiated a new collective bargaining agreement. In those negotiations one of ASRC's initial proposals was to change the agreement so as to terminate the seniority and recall rights of any employee after a period of layoff of more than one year. The Union and ASRC eventually agreed that seniority and recall rights would be terminated after a period of layoff of two years or more. The provision excluded active employees as well as those on medical leaves of absence. (R. 114).

The Union and ASRC further agreed that when the 1981-84 contract expired and was replaced by the 1984-87 contract, those employees who had been on layoff more than two years would automatically lose their seniority and recall rights. Since, under both contracts, the relinquishment of seniority and recall rights

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[1]All citations are to the Joint Appendix which is a part of the record before the Sixth Circuit Court of Appeals.

was a quid pro quo for the receipt of severance pay, those employees would have no right to severance pay once the 1984-87 contract became effective. (R. 72 and 217).

A meeting was scheduled by the Union for March 7, 1984, with ASRC's employees for the purpose of voting to ratify the contract. (R. 296). In order to give the laid off employees, who would lose their seniority under the new contract, time to await the results of the ratification meeting, the Union and ASRC agreed that they would have until March 9, 1984 at 6:00 p.m. to apply for their severance pay. The Union and ASRC also agreed that if the employees did not apply for their severance pay before that time they would lose any right to severance pay. (R. 215-216). All employees on layoff were given notice that they had to apply for severance pay by that time or they would lose their right to severance pay. (R. 118).

On March 7, 1984, the Union membership ratified the contract by a vote of 79 to 7. (R. 296). By 6:00 p.m. on March 9, 1984, all employees who were laid off had requested their severance pay, except Petitioners. (R. 52).

On March 9, 1984, Petitioners filed suit in the United States District Court for the Western District of Kentucky. The Complaint alleged that the Union and ASRC violated the Labor Management Relations Act (LMRA), 29 U.S.C. Section 185(a) and the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. Section 401 *et seq.* by negotiating a contract

which infringed on Petitioners' seniority and recall rights. (R. 14-23).

On March 22, 1984, Petitioners filed an Amended Complaint. (R. 28-38). It added a claim that the Union and ASRC violated the Kentucky Civil Rights Act, KRS Chapter 344, by discriminating against the Petitioners on the basis of their age.

On April 24, 1985, Petitioners moved for leave to file a Second Amended Complaint. The District Court denied this motion but allowed Petitioners to file a Third Amended Complaint. (R. 39-44). It raised another new claim. Petitioners alleged that ASRC and the Union conspired to deprive them of their severance pay benefits in violation of the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 *et seq.*

The District Court granted summary judgment to the Union and ASRC on each of Petitioners' claims by various orders and memoranda entered throughout the course of the litigation. On December 17, 1984, the District Court granted ASRC's motion for summary judgment on Petitioners' age discrimination and Section 301 claims. The Court denied Petitioners' Motion for a Preliminary Injunction and the Union's motion for summary judgment on the Petitioners' LMRDA claim. (R. 69-94).

On November 1, 1985, the Court granted ASRC's motion for summary judgment on Petitioners' claim under the LMRDA as it related to ASRC. (R. 65-68).

On May 1, 1986, the Court denied the Union's renewed motion for summary judgment and granted

ASRC's with respect to all of Petitioners' claims except the allegation that ASRC had violated ERISA. (R. 59-63).

On September 5, 1986, the Court granted the Union's motion for summary judgment on the LMRDA claims. The District Court also granted ASRC's motion to dismiss Petitioners' claim for severance pay under ERISA. The sole claim remaining before the Court, at this point, was that of Petitioner J.J. Edrington, who alleged that he had applied for his severance pay prior to the March 9, 1984, deadline, but had not been paid. (R. 50-58).

On February 9, 1987, the District Court denied Petitioner's motion to set aside its September 5, 1986, Order. It also granted ASRC's motion to dismiss Edrington's claim on the basis that he failed to exhaust the administrative remedies available to him under the collective bargaining agreement. (R. 46-49).

On February 27, 1987, Petitioners filed a Notice of Appeal. (R. 45). After briefs were filed and oral argument was held, the Sixth Circuit Court of Appeals affirmed the District Court's decision. A per curiam order was entered on April 25, 1988.

Petitioners have now requested this Court to review the Sixth Circuit Court of Appeals' decision.

SUMMARY OF ARGUMENT

Supreme Court Rule 17.1 provides that certiorari will be granted "only when there are special and important reasons therefor." Petitioners have presented no special or important reason that would justify the

granting of certiorari in this case. The District Court properly granted summary judgment on Petitioners' claims and the Sixth Circuit Court of Appeals properly affirmed.

ARGUMENT

A. Petitioners Have No Claim Against ASRC Under The Labor Management Reporting and Disclosure Act. 29 U.S.C. Section 401 *et seq.*

Petitioners' argument under the LMRDA focuses upon the Union's alleged violations of this statute. The District Court properly granted summary judgment to ASRC on the basis that the LMRDA "does not apply to employers but only to the relationship between the Union and its members." (R. 66). The statute does not provide for a cause of action against an employer. See, *Thompson* v. *New York Central Railroad*, 361 F. 2d 137 (2nd Cir., 1966) and *Duncan* v. *Peninsula Shipbuilders Assn.*, 394 F. 2d 237 (4th Cir., 1968).

Petitioners do not contend that the District Court erred in granting summary judgment to ASRC on their claims under the LMRDA. Accordingly, there is no reason for granting certiorari on this claim with respect to ASRC.

B. Petitioners Have No Claim Against ASRC Under Section 301 Of The Labor Management Relations Act, 29 U.S.C. Section 185a *et seg.*

Petitioners' argument under Section 301 of the LMRA focuses upon the Union's alleged breach of its duty of fair representation. Petitioners have no claim against ASRC under Section 301.

In the original and Amended Complaint in this case, Petitioners admitted that the collective bargaining agreement, which was the source of their recall and seniority rights, expired on March 1, 1984. (R. 16 and 31).

Accordingly, Petitioners have not and cannot allege that there has been a breach of a collective bargaining agreement. Absent an alleged breach of a collective bargaining agreement, federal courts do not have jurisdiction under Section 301. *Hayes* v. *Consolidated SVC Corp.*, 517 F. 2d 564 (1st Cir., 1975).

Again, Petitioners have presented no reason which would justify the granting of certiorari with respect to ASRC on their claims under Section 301 of the LMRA.

C. Petitioners' Seniority Rights Were Not "Status Benefits".

Petitioners contend that their recall and seniority rights under the 1981-84 collective bargaining agreement were "status benefits" which could not be altered by ASRC and the Union. Petitioners' argument is without merit and provides no reason for the grant of certiorari in this case.

In support of their argument, Petitioners rely exclusively on the Sixth Circuit of Appeals decision in *U.A.W.* v. *Yardman, Incorporated,* 716 F. 2d 1476 (1983), *cert. den.* 465 U.S. 1007 (1984). *Yardman* is inapposite. In *Yardman,* the employer, after the expiration of the collective bargaining agreement, terminated the life and health insurance benefits which

the agreement had provided retirees. The union sued under Section 301, on behalf of the retired employees, contending that the company was obligated to pay the retirees' life and health insurance even after the contract's termination.

The Sixth Circuit Court of Appeals agreed. In framing the issue to be decided, the Court stated, "whether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties." As the Court recognized, "the parties to a collective bargaining agreement may provide for rights which will survive termination of their contractual relationship." *Id.*, at 1479.

To determine the parties' intent, the Court indicated that the language of the agreement, as well as the context in which it was negotiated, must be examined. In upholding the union's claim, the Court found that the language of the agreement demonstrated an intent that the retirees' insurance benefits would continue after the expiration of the contract. In further support of its conclusion, the Court held that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.*, at 1482.

Yardman does not support Petitioner in this case. *Yardman* involved a dispute over the interpretation of ambiguous language in a collective bargaining agreement. The union claimed the language created a

vested right to insurance benefits. The employer argued it did not.

In this case, on the other hand, there is no contention that Petitioners' recall or seniority rights turn upon the interpretation of ambiguous language. There is no dispute between ASRC and the Union as to the meaning of the language governing these rights. The Union and ASRC, through negotiations, agreed to a provision which clearly eliminated Petitioners' seniority and recall rights. Thus, there is no reason to engage in contract interpretation in order to determine ASRC's and the Union's intent.

The legal issue in this case, which was not present in *Yardman,* is whether ASRC and the Union had the right to eliminate Petitioners' seniority. ASRC and the Union had the right to make such a modification. In fact, courts have uniformly held that seniority rights are not vested benefits and, thus, are subject to modification through collective bargaining. *Charland* v. *Norge Division, Borg-Warner Corporation,* 407 F. 2d 1062 (6th Cir., 1969) and *Local 1251, United Automobile Workers* v. *Robertshaw Controls Co.,* 405 F. 2d 29 (2nd Cir., 1968). This Court recognized as much in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953) wherein it was held that a union has the authority and discretion to negotiate seniority provisions which affect employees differently.

Petitioners' argument that their seniority and recall rights were "status" benefits not subject to change presents no reason for the grant of certiorari.

D. ASRC Did Not Violate The Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*, In Limiting Petitioners' Right To Severance Pay.

Petitioners' final argument is that ASRC and the Union violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001 *et seq.* Petitioners' argument is legally baseless and presents no reason for granting certiorari.

The District Court properly granted summary judgment to ASRC on Petitioners' severance pay claims. Provisions concerning severance pay are "employee welfare benefit plan[s]" as defined by ERISA. 29 U.S.C. Section 1002(1). The "vesting" requirements of ERISA do not apply to benefits provided by "employee welfare benefit plan[s]." 29 U.S.C. Section 1051(1). Also see, *White Farm Equipment Company* v. *White Motor Corp.*, 788 F. 2d 1186 (6th Cir., 1986). Since severance benefits are not vested, they are subject to modification through collective bargaining. *Sutton* v. *Weirton Steel Division of National Steel Corporation,* 724 F. 2d 406 (4th Cir., 1983), *cert. den.* 467 U.S. 1205 (1984).

The only provisions of ERISA Petitioners claim ASRC violated are 29 U.S.C. Section 1140 and 1141. Section 1140 only applies to and protects vested rights. It affords no protection to unvested benefits such as severance pay. *Sutton, supra,* at 410-411. Section 1141 of ERISA is a criminal provision which provides no civil cause of action. *West* v. *Butler,* 621 F. 2d 240, 244 (6th Cir., 1980).

Petitioners also argue that ASRC's actions in limiting their right to severance pay were arbitrary and capricious. The arbitrary and capricious standard of review is imposed by ERISA on administrators of a pension or welfare plan. 29 U.S.C. Section 1104. Also see, *Gordon* v. *IBWU-PMA Benefit Funds,* 616 F. 2d 433 (9th Cir., 1980). Such fiduciary requirements only apply in connection with the administration of employee benefit plans. They do not apply to a modification or termination of a plan which does not provide vested benefits. *Sutton, supra,* at 410-411; *Phillips, supra;* and *Flight Officers* v. *United Air Lines,* 756 F. 2d 1262 (7th Cir., 1985).

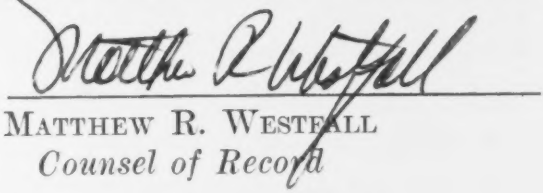
ASRC and the Union had the right under ERISA to agree that Petitioners would not be entitled to severance pay if it was not requested before 6:00 p.m. on March 9, 1984. The District Court properly held that there was no violation of ERISA and granted summary judgment to ASRC on that basis. Petitioners have presented no reason why the District Court was incorrect.

Petitioners mention that J.J. Edrington requested severance pay before the March 9, 1984 cutoff date. (pp. 18-19). The District Court's summary judgment on Edrington's claim for severance pay did not involve ERISA. Rather, Edrington's claim was dismissed because he failed to exhaust the administrative remedies available to him under the collective bargaining agreement. (R. 48). This decision was proper under *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965).

As with Petitioners' other claims, their arguments based upon ERISA present no reason for this court to grant certiorari.

CONCLUSION

In light of the foregoing, American Synthetic Rubber Corporation requests that this petition be denied.



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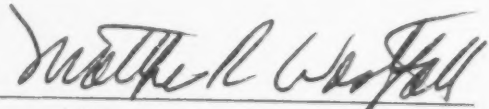
CERTIFICATE

It is hereby certified that a copy of the foregoing has been served by mail pursuant to Supreme Court Rule 28.3 upon Michael Boylan, Counsel for Petitioners, 807 W. Market Street, Louisville, Kentucky 40202; John Frith Stewart, 300 Marion E. Taylor Bldg., Louisville, Kentucky 40202 and Paul Malesick, 87 S. High Street, Akron, Ohio 44308, Counsel for Respondent Unions.



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